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UNITED STATES COPYRIGHT ROYALTY JUDGES

The Library of Congress

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IN THE MATTER OF: )

)

DETERMINATION OF RATES ) Docket No.

AND TERMS FOR MAKING AND ) 16-CRB-0003-PR

DISTRIBUTING PHONORECORDS ) (2018-2022)

(PHONORECORDS III), )

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OPEN SESSION

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7   AND TERMS FOR MAKING AND ) 16-CRB-0003-PR  
8   DISTRIBUTING PHONORECORDS) (2018-2022)  
9   (PHONORECORDS III),        )  
10 -----X  
11 BEFORE:       THE HONORABLE SUZANNE BARNETT  
12                THE HONORABLE JESSE M. FEDER  
13                THE HONORABLE DAVID R. STRICKLER  
14                Copyright Royalty Judges  
15  
16                Library of Congress  
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25       Karen Brynteson, RMR, CRR, FAPR

## 1 A P P E A R A N C E S:

2 Counsel for National Music Publishers Association,

3 Nashville Songwriters Association International:

4 DAVID ZAKARIN, ESQ.

5 BENJAMIN K. SEMEL, ESQ.

6 FRANK SCIBILIA, ESQ.

7 LISA M. BUCKLEY, ESQ.

8 JAMES A. JANOWITZ, ESQ.

9 JOSH WEIGENSBERG, ESQ.

10 MARION HARRIS, ESQ.

11 WILLIAM L. CHARRON, ESQ.

12 KAVERI B. ARORA, ESQ.

13 Pryor Cashman, LLP

14 Seven Times Square

15 New York, New York 10036

16 212-421-4100

17 Counsel for Apple Music, Inc.:

18 DALE CENDALI, ESQ.

19 CLAUDIA RAY, ESQ.

20 MARY MAZZELLO, ESQ.

21 PHILLIP A.L. HILL, ESQ.

22 JOHANNA SCHMITT, ESQ.

23 Kirkland &amp; Ellis, LLP

24 601 Lexington Avenue

25 New York, New York 10022

## 1 APPEARANCES (Continued):

2 Counsel for Pandora Media, Inc.:

3 PETER D. ISAKOFF, ESQ.

4 Weil Gotshal &amp; Manges, LLP

5 1900 Eye Street, N.W.

6 Suite 900

7 Washington, D.C. 20005

8 202-882-7155

9

10 BENJAMIN E. MARKS, ESQ.

11 JENNIFER RAMOS, ESQ.

12 JACOB B. EBIN, ESQ.

13 Weil, Gotshal &amp; Manges, LLP

14 767 Fifth Avenue

15 New York, New York 10153-0119

16 212-310-8029

17

18 DAVID SINGH, ESQ.

19 HONG-AN TRAN, ESQ.

20 Weil, Gotshal &amp; Manges LLP

21 201 Redwood Shores Parkway

22 Redwood Shores, CA 94065

23 650-802-3000

24

25

## 1 APPEARANCES (Continued):

2 Counsel for Spotify USA, Inc.:

3 A. JOHN P. MANCINI, ESQ.

4 XIYIN TANG, ESQ.

5 Mayer Brown LLP

6 1221 Avenue of the Americas

7 New York, New York 10020

8 212-506-2295

9

10 RICHARD M. ASSMUS, ESQ.

11 KRISTINE M. YOUNG, ESQ.

12 Mayer Brown LLP

13 71 S. Wacker Drive

14 Chicago, Illinois 60606

15 312-782-0600

16

17 PETER O. SCHMIDT, ESQ.

18 ANITA Y. LAM, ESQ.

19 Mayer Brown LLP

20 1999 K Street, N.W.

21 Washington, D.C. 20006

22 202-263-3000

23

24

25

## 1 APPEARANCES (Continued):

## 2 Counsel for Amazon Prime Music:

3 MICHAEL S. ELKIN, ESQ.

4 THOMAS PATRICK LANE, ESQ.

5 DANIEL N. GUISBOND, ESQ.

6 STACEY FOLTZ STARK, ESQ.

7 SCOTT M. AHMAD, ESQ.

8 SCOTT R. SAMAY, ESQ.

9 Winston &amp; Strawn, LLP

10 200 Park Avenue

11 New York, New York 10166

12 212-294-6700

13

## 14 Counsel for Google, Inc.:

15 KENNETH STEINTHAL, ESQ.

16 JOSEPH WETZEL, ESQ.

17 DAVID P. MATTERN, ESQ.

18 KATHERINE E. MERK, ESQ.

19 JASON BLAKE CUNNINGHAM, ESQ.

20 King &amp; Spalding, LLP

21 101 Second Street, Suite 2300

22 San Francisco, CA 94105

23 415-318-1211

24

25

1 P R O C E E D I N G S

2 (9:07 a.m.)

3 JUDGE BARNETT: Good morning. All but  
4 the witness please be seated. Please raise your  
5 right hand.  
6 Whereupon--

7 JEFFREY A. EISENACH,  
8 having been first duly sworn, was examined and  
9 testified as follows:

10 JUDGE BARNETT: Please be seated.

11 THE WITNESS: Thank you.

12 MR. MARKS: Your Honor, there's one  
13 housekeeping matter that we wanted to raise with the  
14 Judges before we start the witness testimony today.

15 JUDGE BARNETT: I love the fact that you  
16 guys are so concerned with housekeeping. After this  
17 is over, I have got a little townhouse. I'm sorry.

18 (Laughter)

19 MR. MARKS: I think the Copyright Owners  
20 have agreed to take care of that piece of it.

21 But for -- but for my piece, the parties  
22 have met and conferred with respect to a proposed  
23 briefing schedule on the proposed findings of fact  
24 and conclusions of law and wanted to propose June 1  
25 as the due date for first round initial proposed

1 findings of fact and conclusions of law and June 22  
2 as a date for reply filings and just wanted to  
3 propose that on behalf of all parties.

4 JUDGE BARNETT: Thank you, Mr. Marks.  
5 We'll take it under advisement.

6 MR. MARKS: Thank you.

7 JUDGE BARNETT: Mr. Semel?

8 MR. SEMEL: Thank you, Your Honor. We  
9 have -- you've already sworn in the first witness,  
10 Dr. Jeffrey Eisenach.

11 JUDGE BARNETT: I have. And,  
12 Dr. Eisenach, if you could begin by saying and  
13 spelling your name for the record.

14 THE WITNESS: Of course. Is the sound  
15 okay? Can you hear me? Good, thank you.

16 Jeffrey August Eisenach, J-e-f-f-r-e-y,  
17 A-u-g-u-s-t; the last name is E-i-s-e-n-a-c-h.

18 DIRECT EXAMINATION

19 BY MR. SEMEL:

20 Q. And, Dr. Eisenach, could you tell us what  
21 is your profession?

22 A. Good morning, Mr. Semel.

23 Q. Good morning.

24 A. I'm an economist.

25 Q. And do you have any specialties within



1 the field of economics?

2 A. I do. I specialize in microeconomics,  
3 regulatory economics, and the economics of  
4 industrial organization, and particularly with  
5 applications to markets involving communications,  
6 media, and the Internet.

7 Q. And can you give us a brief overview of  
8 your educational background in the field of  
9 economics?

10 A. Yes, I have a Bachelor's in economics  
11 from Claremont McKenna college and a Ph.D. in  
12 economics from the University of Virginia.

13 Q. And can you also give us a brief overview  
14 of your professional experience in the field of  
15 economics?

16 A. Well, I've taught economics. I have  
17 practiced economic consulting for about 15 years.  
18 I've worked in think tanks and also worked for the  
19 Federal Government at the Federal Trade Commission  
20 and the Office of Management and Budget.

21 Q. And have you authored peer-reviewed  
22 publications in the field of economics?

23 A. Yes, I've offered -- authored numerous  
24 peer-reviewed articles in peer-reviewed  
25 publications.

1 Q. And have you taught higher education in  
2 the field of economics?

3 A. Yes. I'm currently an adjunct faculty  
4 member at Scalia Law School, George Mason law  
5 school, where I teach regulated industries. I  
6 previously taught at Harvard's Kennedy School of  
7 Government, at VPI, and -- and VPI.

8 Q. And have you ever testified as an expert  
9 witness in the field of economics?

10 A. Yes, I've testified and submitted expert  
11 reports in about 40 matters involving litigation and  
12 regulatory proceedings in a number of countries,  
13 including the U.S., Australia, South America, and  
14 the United Kingdom.

15 Q. And has your professional work involved  
16 economics of copyrights and intellectual property?

17 A. Yes, it has. I've written scholarly  
18 articles on copyright issues. I have testified on  
19 intellectual property and copyright issues, both in  
20 the U.S. and abroad. And I'm an expert in an  
21 ongoing arbitration matter, the RMLC, the SESAC  
22 litigation that has been going on up in New York.

23 Q. And has any court or tribunal ever failed  
24 to recognize your economic expertise?

25 A. No.

1           MR. SEMEL: At this time, Your Honors, I  
2 would offer Dr. Jeffrey Eisenach as an expert  
3 witness in microeconomics, the economics of  
4 industrial organizations, and regulatory economics.

5           MR. ISAKOFF: No objection.

6           JUDGE BARNETT: I heard it, but I  
7 didn't --

8           MR. ISAKOFF: That was me, Your Honor.

9           JUDGE BARNETT: Thank you, Mr. Isakoff.  
10 Dr. Eisenach is so qualified.

11           MR. SEMEL: Thank you.

12 BY MR. SEMEL:

13           Q. Dr. Eisenach, did you submit written  
14 testimony in connection with this proceeding?

15           A. Yes, I did.

16           Q. So I'll ask you to turn to the binder in  
17 front of you and take a look at the first three  
18 tabs, which bear the numbers H-3027, H-3033, and  
19 H-3393, and ask you are these correct copies of the  
20 reports you submitted in this proceeding, with your  
21 signature towards the back of each?

22           A. They appear to be.

23           Q. Thank you.

24           MR. SEMEL: Your Honors, at this time,  
25 we'd offer into evidence hearing Exhibits 3027, 3033

1 and 3393.

2 MR. ISAKOFF: No objection, Your Honor.

3 JUDGE BARNETT: 3027, 3033, and 3393 are  
4 admitted.

5 (Copyright Owners Exhibit Numbers 3027,  
6 3033, and 3393 were received into evidence.)

7 MR. SEMEL: Thank you.

8 BY MR. SEMEL:

9 Q. Dr. Eisenach, did you offer expert  
10 opinions in the written testimony that we've just  
11 identified?

12 A. I did. And I've prepared some slides. I  
13 think we've actually managed to get the first one up  
14 already. So if we could move to the next slide, I  
15 can summarize the -- the issues upon which I offered  
16 expert opinions.

17 Q. Great. Thank you.

18 How did you come to the topics on which  
19 you offered opinions?

20 A. Well, I was offered -- I was asked to  
21 look at two different sets of issues or two  
22 different assignments. The first is to provide my  
23 expert economic opinion on the reasonable --  
24 reasonableness of the rates and terms put forward by  
25 the Copyright Owners for the Subpart B and Subpart C

1 licenses for the term being considered in this  
2 proceeding, 2018 to 2022, and whether those rates  
3 are consistent with the requirements set forth in  
4 Section 801(b) of the copyright Act.

5 And then, secondly, to assess the  
6 validity of the analysis and opinions put forward by  
7 the Services' economic experts.

8 JUDGE STRICKLER: Excuse me,  
9 Dr. Eisenach. Good morning.

10 THE WITNESS: Good morning.

11 JUDGE STRICKLER: I have -- I have a  
12 question for you. Do you consider the -- in the  
13 first bullet point, the two assignments to be  
14 discrete, one being to determine the reasonableness  
15 of the rates and, secondly, to determine whether or  
16 not the rates were consistent with the requirements  
17 of 801(b), or did you think of that as a combined  
18 analysis?

19 THE WITNESS: Yeah, well, I think of it  
20 holistically, I think, at the end of the day, where  
21 it's only set of standards here that the rates need  
22 to meet. We're guided by Section 801(b) of the  
23 Copyright Act, and I understand that.

24 My approach to assessing rates reasonable  
25 under the statutory guidelines is to begin by

1 seeking evidence on the fair market value of the  
2 rates. And then in -- secondarily, to seek to  
3 understand whether or not any of the requirements of  
4 Section 801(b) would require adjustments to those  
5 fair market value rates.

6 JUDGE STRICKLER: Thank you.

7 BY MR. SEMEL:

8 Q. And can you give us a brief overview of  
9 some of your main findings in your opinions?

10 A. Yes. If we can go to the next slide.  
11 And I'll walk very briefly through these because  
12 we're going to hit them as we go along. First, as  
13 we just mentioned, that the 801(b) standards can be  
14 informed using a market-based benchmark. Second,  
15 that the rate for interactive sound recording  
16 licenses paid by the Services to the labels provides  
17 a robust benchmark for the fair market value.

18 Thirdly, that the Copyright Owners'  
19 proposal falls well within the reasonable range that  
20 I established based on that benchmarking exercise.  
21 Last -- or, fourthly, that the Services' arguments  
22 about disruption and availability are incorrect.

23 And, finally, that the Services'  
24 rationale for adjusting the existing rate structure  
25 is unsound and also ultimately incorrect.

1 Q. And just to clarify, these are findings  
2 that you -- that are in both your direct and your --  
3 split between your direct and rebuttal reports?

4 A. Yes, primarily the first three findings  
5 primarily in my direct report, and the final two  
6 more in the nature of rebuttal.

7 Q. And going to your benchmark analysis, can  
8 you give us an overview -- I know you started in  
9 response to Judge Strickler's question -- give an  
10 overview of your methodology with respect to that?

11 A. Yes. So looking at the next slide,  
12 really just three straightforward steps. First to  
13 estimate a reasonable range for the fair market  
14 value of the rights at issue by using benchmarking.  
15 Second and importantly, I think to assess against  
16 contextual factors. I think it's important always,  
17 in doing exercises like this, to look at  
18 developments in the market, technological  
19 marketplace and -- and others, to assure that you're  
20 living in the real world, as it were.

21 And then, finally, as I mentioned, to  
22 consider the need for possible adjustments to  
23 reflect the 801(b) criteria.

24 Q. And in looking at the 801(b) criteria,  
25 how did you evaluate those criteria for use in your

1 opinions?

2           A. Well, broadly speaking -- and I looked in  
3 part at the way the CRB has done this in the past,  
4 as I understand it -- the first three criteria, and  
5 I would say as an economist also, are broadly  
6 consistent with fair market value market-based  
7 rates.

8           The fourth criteria, minimizing  
9 disruption, may or may not be something that comes  
10 out of natural negotiations in the marketplace. So  
11 that one, in particular, is one that you have to  
12 take into consideration to determine whether there  
13 would be adjustments from a fair market value rate.

14          Q. And -- and is this benchmarking approach  
15 that you're using, is it different from other  
16 approaches you've seen in this proceeding?

17          A. Well, it is. And if we can see the next  
18 slide, again, I think we're hitting the same points  
19 repeatedly, but let me now distinguish my approach  
20 from -- and the approach taken by some of the  
21 Service experts.

22               I do begin by seeking to establish the  
23 fair market value of the rates, based on current  
24 voluntary bargains in the marketplace, and then move  
25 to assessing how those might be affected by



1 consideration of the 801(b) standards.

2           My understanding of the Service experts'  
3 approach to some extent, particularly Dr. Katz and  
4 -- and Dr. Marx, is to really begin with the 801(b)  
5 standards to embrace the current 2012 settlement as  
6 a benchmark and under the shadow of the compulsory  
7 license and to try to embrace that as a -- as a  
8 strength, that somehow that agreement would embody  
9 the 801(b) standard simply because it was negotiated  
10 under the shadow of the license.

11           I have two -- several problems with that.  
12 It's inherently circular. It provides no  
13 information about market values and, in particular,  
14 about current market values.

15           Essentially, what we're estimating is the  
16 market -- is the parties' predictions of what the  
17 Judges would decide in the event of a rate case.  
18 And if we go to the next slide, you know, I think  
19 there are problems with all of these aspects. The  
20 first is simply, you know, the underlying problem  
21 with looking at an agreement negotiated under the  
22 shadow of a license. It shifts bargaining power  
23 from the compelled party to the uncompelled party by  
24 the very nature of the exercise.

25           And as we'll talk about in establishing

1 fair market value, one of the three basic criteria  
2 is that the parties to the deal are not compelled.  
3 So Number 1 is the shifting of bargain power,  
4 bargaining power.

5               Second, there's nothing in bargaining  
6 theory which suggests that parties reach agreements  
7 that would satisfy a third-party arbitrator. And I  
8 was here for Dr. Katz's testimony. There was a long  
9 discussion about this, and I think Dr. Katz  
10 ultimately conceded that point. I'm not sure  
11 Dr. Marx so much has conceded that point, but what  
12 -- what the -- what the shadow may do arguably is  
13 establish disagreement points.

14              If your best -- if each party's best  
15 available alternative is to go to court, then each  
16 of them will seek to try to figure out what would  
17 happen if they did that. Their estimate of that,  
18 their prediction of that, would be their  
19 disagreement point.

20              But within those agreements, there's --  
21 but beyond those disagreement points, there's  
22 nothing that suggests that they would reach terms  
23 that would satisfy, for example, the 801(b)  
24 standards.

25              Thirdly, even in the unlikely event that

1 the prior settlement perfectly predicted what the  
2 Judges would have done -- and I think that's not  
3 likely or even plausible -- that would not make it a  
4 perfect predictor of what they would do today. And  
5 for two reasons.

6           One is that Judges change. Standards  
7 change. The framework of analysis changes. So  
8 whatever might have happened in 2012, even if all  
9 the facts were the same, wouldn't necessarily be  
10 what would be decided today, given five more years  
11 of precedent, analysis, progress of the art, of  
12 assessing these issues.

13           But even if that hadn't changed, dramatic  
14 changes have occurred since the 2012 settlement,  
15 which I think just flatly disqualify it as a  
16 benchmark for anything, any prediction of what the  
17 outcome would be today. One of those things being  
18 that the Copyright Owners no longer regard the 2012  
19 settlement as a reasonable -- as satisfying their  
20 disagreement point.

21           If we can go to two more slides --

22           JUDGE STRICKLER: Before you move on,  
23 just staying with this slide for a second, if I  
24 might.

25           THE WITNESS: Yes, sir.

1 JUDGE STRICKLER: The first bullet point  
2 with regard to the compulsory license shifting the  
3 bargaining power away from the compelled party, that  
4 is away from the licensors.

5 THE WITNESS: Right.

6 JUDGE STRICKLER: One of the Services'  
7 experts, I don't recall who it was, in response, in  
8 rebuttal, said that the shift is really not as --  
9 that dramatic as you say because the licensees'  
10 walk-away power, which we -- which they retain, is  
11 rather weak, because walking away in this must-have  
12 situation really means going out of business.

13 So while they have the option to do that,  
14 no doubt, it's a rather weak hand -- I'm  
15 paraphrasing now -- a rather weak hand to play. How  
16 would you respond to that?

17 THE WITNESS: Well, you know, I think  
18 that's a very important point in this proceeding.  
19 And -- and it's in the slides for later, but let me  
20 go ahead and address it now.

21 The benchmarks that I'm looking at in  
22 this proceeding are benchmarks negotiated -- recent  
23 benchmarks negotiated between firms, new entrants  
24 into the marketplace like Google, Amazon, and Apple.

25 There are two things that are important

1 about the identity of those firms and the nature of  
2 those negotiations. The first is that we are  
3 talking about Apple, Amazon, and Google. And I  
4 think someone joked there's more market  
5 capitalization represented in this room than maybe  
6 any other courtroom in history today. Three very  
7 large firms, and that's relevant because bargaining  
8 power is in part related to the ability to withstand  
9 risk. It's in part related to negotiating acumen.  
10 All of those things are at their pinnacle when  
11 you're talking about firms like Google, Apple, and  
12 Amazon.

13 But, 0secondly, and I think even more  
14 importantly from an economic perspective, we're  
15 talking about firms who are making decisions; the  
16 rates we're looking at are decisions that are made  
17 during the course of the consideration of whether to  
18 enter markets.

19 So it may have been Dr. Leonard who said  
20 the essence of hold-up power is sunk costs. It's  
21 the fact that, as you said, you go out of business.  
22 Well, these firms for the most part weren't in the  
23 business.

24 And the business is changing so fast that  
25 even if you're in it, there is -- I don't think

1 you're locked in to anything in particular, but  
2 thinking just about the point of entry, these firms  
3 are making a decision, and as they make that  
4 decision -- I think it was Mr. McCarthy who talked  
5 about bets. And he said every quarter at Spotify we  
6 sit down -- I think he said quarter -- we sit down  
7 and we look at the opportunity to make bets, to make  
8 investments in alternative businesses. How are we  
9 going to spend our scarce capital in order to  
10 maximize our rate of return?

11 Well, that -- in my experience, that  
12 exercise happens in every major corporation. So as  
13 Google, Apple, and Amazon are sitting down to decide  
14 whether or not to enter the market for interactive  
15 streaming or to continue innovating in the market,  
16 to continue introducing new products, as they're  
17 making those decisions, they're thinking about these  
18 rates.

19 And they're sitting across the table from  
20 the publishers. And the publishers' ability -- or  
21 the -- or the labels. And the Rights Owners'  
22 ability to extract rents, extract quasi rents, is  
23 what we call them in economics, from the -- from the  
24 Services in that context is limited by the  
25 difference between the interactive services'

1 investment return and the return on the next best  
2 thing.

3 And it may be smart cars. It may be  
4 drones. It may be rockets to Mars. These people  
5 are engaging in lots of investments. But your  
6 hold-up capability is limited by the return on the  
7 next best investment.

8 And when your Apple, Google, and Amazon,  
9 or for that matter -- for that matter Pandora, you  
10 have lots of different investment alternatives. And  
11 I think your ability to hold up -- the ability of  
12 the publishers or the rightsholders to hold up those  
13 firms is extremely limited by that fact.

14 JUDGE STRICKLER: But do the  
15 rightsholders really suffer very much if Amazon,  
16 Google, and Apple decide to go to Mars, instead of  
17 licensing music because the threat is not a great  
18 threat, I think one of the arguments is made,  
19 because the Copyright Owners can still license to  
20 Spotify, to Pandora, and to any other interactive  
21 streaming service, so the threat -- they may --  
22 those larger companies may well act on the threat,  
23 but it's not particularly costly to the Copyright  
24 Owners?

25 THE WITNESS: But -- but the relevant

1 point -- I'm an empiricist at the end of the day,  
2 and the relevant point -- I'll come back to that --  
3 let's look at what happened in the marketplace.  
4 They didn't choose -- those firms did not choose.  
5 So the benchmarks that I'm looking at are benchmarks  
6 of actual agreements entered into by those firms  
7 under those circumstances.

8                   And so that's the -- that's the way I --  
9 I come to the conclusion that disproportionate  
10 bargaining power is not -- on behalf of the  
11 Copyright Owners is not reflected in the agreements  
12 that I've witnessed, that I have --

13                   JUDGE STRICKLER: Thank you.

14 BY MR. SEMEL:

15           Q. And you mentioned at the end of your last  
16 slide, you were talking about changes to the market.  
17 Just briefly, did you -- did you evaluate market  
18 changes in your --

19           A. I did, if we just look at the next two  
20 slides, you know, very quickly. Just two aspects of  
21 change that I think are relevant to the -- whether  
22 the 2012 agreement as used by the Service experts is  
23 -- is a comparable bargain or provides insight into  
24 current values or current outcomes in any sense.

25                   The first is that streaming has expanded



1 dramatically from about 5 percent of the market in  
2 2011, that's when the 2012 agreement was being  
3 negotiated, to 35 percent in -- and this is -- that  
4 number is the first half of 2016 number. We now  
5 have full 2016 numbers from a couple days ago, which  
6 I think are about 40 percent of the market for the  
7 full year for 2016.

8           And if we look at the next slide, we see  
9 the entry that has occurred during this period. And  
10 just a completely different set of players. Not  
11 only the large firms that I mentioned but firms with  
12 business models that involve incorporating  
13 interactive services into larger bundles and  
14 platforms into -- into the ecosystems of companies  
15 like Apple, Amazon, and -- and Google.

16           Q.   So looking then at your benchmarking  
17 approach, what criteria did you apply to -- let's  
18 say, to start the analysis, to select the potential  
19 benchmarks that you're going to use?

20           A.   So two sets of criteria. One going to  
21 the question of whether a bargain represents fair  
22 market value, and the second going to the question  
23 of whether it's comparable. We're looking at the  
24 three criteria that I apply on this slide to -- to  
25 assess whether a bargain is a -- constitutes a

1 bargain that -- that's indicative of fair market  
2 value.

3           And these are three criteria I think you  
4 find in any valuation textbook. I actually cite the  
5 textbook recently authored by Dr. Zmijewski, who I  
6 think has appeared here. He's my former partner, is  
7 the only reason I can pronounce his name. And  
8 Dr. Zmijewski's textbook is the -- is the citation  
9 that I used, but you can find these anywhere.

10           A willing and unrelated buyer and seller,  
11 and those are both important criteria unrelated. It  
12 will be one that we'll come back to. Neither party  
13 being compelled to act. We've already talked about  
14 the significance of that in this case. And then  
15 both parties being reasonably informed on relevant  
16 information. I think in these cases we're looking  
17 at sophisticated parties generally.

18           Then moving to the next slide, five  
19 criteria. And this is bread and butter for probably  
20 everyone in this room, certainly for the Judges.  
21 You know, criteria that one would apply to determine  
22 whether a bargain is a comparable bargain. Are the  
23 legal rights conveyed the same or comparable rights?  
24 Are the downstream uses to which the rights are  
25 being put comparable in terms of value and the value

1 being generated?

2 Are the markets, particularly geographic  
3 markets, comparable? Are we using benchmarks from  
4 outside the U.S.? And we want to pay attention to  
5 that if we are. Are the time periods comparable?  
6 And in this case, 2012 agreements versus agreements  
7 which are current. We never have the luxury of --  
8 when we're setting rates in the future, we never  
9 have -- have the luxury of looking at concurrent  
10 bargains, but we can look at bargains which are at  
11 least current bargains.

12 And then parties. Are the parties  
13 similarly situated in terms of issues like  
14 bargaining power? And so those are -- those are the  
15 five criteria for -- that I apply for comparable  
16 bargains.

17 Q. Thank you. And at this time, I've got a  
18 slip sheet into our demonstrative to make sure we  
19 didn't flip over.

20 JUDGE BARNETT: Thank you.

21 MR. SEMEL: Unfortunately, the benchmark  
22 agreements are generally considered restricted so I  
23 expect the rest of his direct will be a restricted  
24 session.

25 JUDGE BARNETT: Okay. For those in the

1 hearing room who are not privy to restricted or  
2 confidential information, relevant to this case,  
3 please wait outside.

4 And this will cut across the various  
5 Services, correct?

6 MR. SEMEL: It will, yes.

7 JUDGE BARNETT: So Services' executives,  
8 and in-house counsel and whatnot will be also  
9 excluded.

10 (Whereupon, the trial proceeded in  
11 confidential session.)

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1 O P E N S E S S I O N

2 CROSS-EXAMINATION

3 BY MR. ISAKOFF:

4 Q. You're Eisenach. I'm Isakoff. Let's see  
5 if we can not get confused as to which one of us is  
6 which, okay?

7 A. I'll do my best, Mr. Isakoff.

8 Q. Thank you. Your job, as you testified on  
9 direct examination, was to opine as to whether the  
10 Copyright Owners' proposal in this proceeding was  
11 reasonable; is that right?

12 A. Yes, simple one word, that's a fair --  
13 fair word, yes.

14 Q. All right. And you were also consulted  
15 in connection with that proposal, correct?

16 A. Was I involved in developing the  
17 proposal?

18 Q. I asked whether you were consulted in  
19 connection with it.

20 A. I don't know. I don't understand the  
21 question. It's very vague.

22 Q. Could we put up Dr. Eisenach's deposition  
23 transcript, page 204? And starting at lines 22.

24 "Question: I'm just going to ask for a  
25 yes or no on that. Not what you told them, but

1 whether you were consulted in connection with the  
2 NMPA's rate proposal, yes or no?"

3 Mr. Janowitz says you can answer that.

4 "Answer: Yes."

5 Were you asked that question and did you  
6 give that answer?

7 A. Yes, I did.

8 Q. All right.

9 A. And thank you for clarifying.

10 Q. Can we put up -- can we put up slide 1,  
11 please?

12 JUDGE BARNETT: Before we go there, is  
13 there an exhibit number on the deposition  
14 transcript?

15 MR. ISAKOFF: Yes. It is 6028.

16 JUDGE BARNETT: Thank you.

17 (Pandora Exhibit 6028 was marked for  
18 identification.)

19 BY MR. ISAKOFF:

20 Q. Okay. This is the Copyright Owners'  
21 proposal, correct?

22 A. That's correct, yes, the rate -- that's  
23 the rate and the -- those are the rates from the  
24 Copyright Owners' proposal, that's correct.

25 Q. All right. And it says .0015 per-play.

1 Is that equivalent to 15 cents per 100 plays?

2 A. Yes, it is.

3 Q. Somehow in my head, I can 15 cents and  
4 100 plays better than what .0015 is. And it's -- or  
5 \$1.06 per user per month, whichever is greater,  
6 correct?

7 A. Correct.

8 Q. And so it could end up being more than 15  
9 cents per 100 plays, if, in fact, the per user per  
10 month prong kicks in, right?

11 A. That's correct.

12 Q. And it applies to every stream, even  
13 those that are under 30 seconds, sometimes referred  
14 to as skips. Do you understand that's the Copyright  
15 Owners' proposal?

16 A. That's my understanding.

17 Q. Okay. And what you did was you used your  
18 benchmark analysis to test the reasonableness of the  
19 Copyright Owners' proposed structure, and you did  
20 not attempt to benchmark any other structure, did  
21 you?

22 A. Well, I -- I -- that's -- I did not  
23 benchmark any other structure, that's correct.

24 Q. You didn't attempt to see whether a  
25 reasonable benchmarking analysis might validate a

1 different headline rate, let's say, than the  
2 10.5 percent that's currently in effect?

3 A. Yes, I -- I assessed whether the  
4 Copyright Owners' proposal was supported by  
5 benchmarks based on marketplace values, as I  
6 testified this morning, that's correct.

7 Q. All right. But you didn't do any similar  
8 benchmarking analysis using a different structure  
9 such as percentage of revenue, did you?

10 A. The -- the benchmarking exercise was  
11 conducted in the context of the structure of the  
12 Copyright Owners' proposal.

13 Q. Okay. So if the Copyright Owners'  
14 proposed structure were not accepted, your opinion  
15 really wouldn't have any application, would it?

16 MR. SEMEL: Objection, Your Honor, calls  
17 for legal conclusion.

18 JUDGE BARNETT: Overruled.

19 THE WITNESS: The -- as stated in -- as  
20 expressed in my reports, my analysis expresses  
21 values in terms of per-subscriber -- per-user rates  
22 and per-play rates.

23 The conversion of those rates into  
24 percentages of revenues is not something which I did  
25 in the context of my report. The values upon which



1 my calculations are based would not be limited to  
2 per-play or per-user, a per-play or per-user  
3 structure for rates.

4 BY MR. ISAKOFF:

5 Q. Let's go to slide 2, please. Now, you  
6 would agree that these are the 801(b) factors with  
7 which we're all familiar?

8 A. You have quotes around them, so I'll  
9 assume they're correct, yes.

10 Q. Okay.

11 JUDGE BARNETT: Mr. Isakoff, could you  
12 move that mic just a little bit in your direction?

13 MR. ISAKOFF: Okay.

14 JUDGE BARNETT: Thank you.

15 MR. ISAKOFF: I was afraid of being too  
16 loud. Sometimes people are so close to it that, one  
17 of the songwriters in particular, I wasn't quite  
18 sure what -- what to do with myself during that.  
19 But anyway.

20 BY MR. ISAKOFF:

21 Q. Now, your view as I heard it on direct  
22 examination, and I think you said the same thing in  
23 your report, is that basically you regard the first  
24 three factors as essentially equivalent to a  
25 traditional fair market value analysis and that then

1 factor D would suggest that if a fair market value  
2 analysis would disrupt the industry, then you  
3 consider that too. Did I get that right?

4 A. It's not the way I phrased it. I think I  
5 said -- I don't think I used the word "equivalent."  
6 I think I used the word "consistent with," but I  
7 won't quibble with you.

8 Q. In fact, it's not as if it's a two-part  
9 standard, that one says fair market value unless  
10 there's disruptive impact, right? It doesn't say  
11 that?

12 A. No, it doesn't say that.

13 Q. Now, I believe it's your testimony today  
14 and also really is a large part of your rebuttal  
15 report starting at page 12, that looking at industry  
16 practices that would otherwise be governed by the  
17 801(b) -- 801(b) factors are less appropriate for  
18 use as a benchmark than things that are completely  
19 outside that shadow, correct?

20 A. I don't -- I think you're  
21 misinterpreting. Let me go to -- where -- where  
22 would you like me to begin?

23 Q. I was just referring, frankly, to your  
24 direct testimony today, that basically it's your --  
25 it's your opinion that where contractual deals are

1 struck in an area where the 801(b) factors would  
2 apply, if they didn't reach agreement, that you  
3 should ignore those in setting a benchmark in this  
4 case, correct?

5 A. No, I don't think I've said that, and I  
6 don't think that's my opinion. My -- my opinion is  
7 that the 2012 settlement and the direct agreements  
8 reached directly subject to -- to that settlement,  
9 with that settlement as a back-stop and an  
10 alternative, that that 2012 agreement is not a valid  
11 benchmark in this case for two reasons.

12 One being the fact that the market has  
13 changed so dramatically both in terms of the size  
14 and the nature of the market and in terms of the  
15 participants. And, secondarily, because or, in  
16 addition, not necessarily secondarily, because the  
17 premise put forward by Dr. Marx, in particular,  
18 Dr. Katz to some extent, some of the other experts  
19 occasionally referencing it, the premise that a  
20 voluntarily negotiated agreement where the  
21 alternative would be to go before a third-party  
22 arbitrator would reflect the criteria that would be  
23 applied by the third-party arbitrator, had the trial  
24 occurred, is a faulty premise.

25 Q. Okay. Let's -- well, let's go back a

1 little bit to the materials that you relied on for  
2 your opinions in this matter. Could we call up  
3 Appendix A of Dr. Eisenach's first report, which I  
4 believe is Exhibit 3027. Okay.

5 And these -- this lists for several  
6 pages -- it looks like about seven pages of  
7 materials you relied on or eight pages? Is that  
8 right?

9 A. Do I have that?

10 Q. You have it in the binder that the  
11 Copyright Owners put up there. It's the smaller  
12 binder.

13 A. Yes, I see that.

14 Q. Okay. And this includes a number of  
15 contracts?

16 MR. SEMEL: To be clear, are you in the  
17 direct report now?

18 MR. ISAKOFF: Yes. Yes, we are. The  
19 first report, Exhibit 3027, Appendix A.

20 THE WITNESS: So is this page A-1,  
21 materials reviewed?

22 BY MR. ISAKOFF:

23 Q. That's where I'm starting.

24 A. Okay.

25 Q. Okay. And then you list a variety of

1 contracts starting at the bottom on page A-1 and  
2 going, it looks like, for about another four pages  
3 through A-5?

4 A. I don't know if we're looking at the same  
5 -- I apologize. I have -- I have a document that  
6 says at the top materials reviewed and the  
7 contracts --

8 Q. Are you looking at Appendix A to your  
9 initial report?

10 A. Well, I thought so. Oh, I'm looking at  
11 -- I apologize. I'm very sorry. I was in Appendix  
12 A to my rebuttal report. Let's get to the right  
13 place. We are now on the same page.

14 Q. Now we're in the right place, you list  
15 for about eight pages the materials you relied on  
16 for your initial report; is that correct?

17 A. Yes.

18 Q. Okay. And that includes a whole lot of  
19 contracts starting at A-1, going through, it looks  
20 like, A-5?

21 A. Yes.

22 Q. And that includes both musical works  
23 agreements and sound recording agreements?

24 A. Yes.

25 Q. And it includes some YouTube agreements

1 for musical works rights, but not for the sound  
2 recording rights because you only got those later,  
3 right?

4 A. Yes.

5 Q. And those you cite and reference in your  
6 supplemental report?

7 A. Yes.

8 Q. Which, for the record, is Exhibit 3393?

9 A. Yes.

10 Q. Okay. And -- and I'd like you to turn  
11 your attention to page A-3 of the appendix to your  
12 first report, Exhibit 3027. And toward the bottom  
13 of the page, third from the bottom, you list some  
14 contracts from 2013 going to the next page, '13,  
15 '14 --

16 A. What page are we on?

17 Q. Bottom of A-3, third from the bottom.  
18 Let's start there.

19 A. Okay. And I see it. 2013 and then I see  
20 a 2012 and then I see one without a date.

21 Q. Right.

22 A. Then some with 2013 and '14 on the next  
23 page.

24 Q. Okay. Well, we'll get to the specifics  
25 of these when we get to closed session, but these

1 are sound recording agreements that you considered,  
2 correct?

3 A. Looking at the names of the parties, they  
4 all appear to be sound recording agreements, yes.

5 Q. All right. Well, we'll look at the  
6 contracts themselves. We can -- we can reserve  
7 that.

8 And you also considered, if you go to  
9 page A-8, toward the bottom of the page, the second  
10 from the bottom, that is the CRB's decision in SDARS  
11 I; is that right?

12 A. That's what it's usually referred to,  
13 yes.

14 Q. Okay. And then right below that is the  
15 CRB's decision in Phono I?

16 A. I -- I believe those are the references  
17 to those documents, sure.

18 Q. Okay. When you relied on them, you had  
19 them available to you?

20 A. Yes.

21 Q. Okay. And you cite them in the report,  
22 correct?

23 A. I believe they're cited in the report,  
24 yes.

25 Q. Okay. All right. And then if you go to

1 page A-9, the third item is SDARS II, is that right,  
2 the one from April 17, 2013?

3 A. I take your word for it. I believe  
4 that's the right Federal Register reference.

5 Q. Okay. Well, I assume you're familiar  
6 with these documents that you relied on, correct?

7 A. Yes, but all of these documents have very  
8 similar names. You're asking me is this a  
9 particular decision at a particular time. There are  
10 multiple decisions in these matters, and I'm taking  
11 your word that this is the final decision that  
12 you're telling me it is --

13 Q. Well --

14 A. -- but I assume it is.

15 Q. We'll show it to you. Some of them,  
16 anyway. And then the next one is Judge -- is a  
17 decision in the Pandora/ASCAP case; is that right?  
18 Page A-8, A-9?

19 A. Yes, that's correct.

20 Q. Okay. And then I guess about the -- the  
21 second to last item before you get to industry  
22 reports, that's Phono -- that's Web IV, correct?  
23 That's the one of this panel that came out last  
24 spring?

25 A. Helpfully, we put Web IV in parenthesis



1 there, so we know that's -- we know that's true.

2 Q. Okay. So -- so let's go back to our  
3 discussion of the 801(b) factors. And that's what  
4 applies here, right?

5 A. Yes.

6 Q. And -- and some of the materials you  
7 relied on did not concern rate-making proceedings  
8 where 801(b) applied, but maybe a willing  
9 buyer/willing seller standard, that kind of thing?

10 A. Well, the willing buyer/willing seller  
11 standard applies in Web IV, for example.

12 Q. Right. Okay. And let's -- I know you  
13 mentioned this in your direct testimony, your added  
14 -- well, I want to bring this up because of what it  
15 says about your view of 801(b).

16 You mentioned that you testified before a  
17 subcommittee of the Judiciary Committee of the House  
18 of Representatives back in November of 2012. Do you  
19 recall that?

20 A. Yes, I recall that.

21 Q. Okay. And in your binder, binder 2, is  
22 Exhibit 1698.

23 A. Which volume do we have?

24 Q. It's volume 2. It's Exhibit 1698. The  
25 numbered exhibits in the binders are all

1 consecutively numbered. So if you see one of them,  
2 you'll see the others.

3 I apologize for the mountain of material  
4 we have here. It's a lot of paper in this case.

5 A. I did notice that.

6 Q. And so what you have up there, just for  
7 the record, is -- in addition to your three reports  
8 in the Copyright Owners' binder, is two binders of  
9 exhibits from us, plus your deposition exhibit --  
10 deposition transcript, and, in case you want to use  
11 it, a calculator.

12 A. Appreciate that. So what tab am I at?

13 Q. You are on Exhibit 1698. They're in  
14 numbered order.

15 A. There we go.

16 MR. SEMEL: If I can ask, I have a little  
17 objection. Is this being used to impeach the  
18 witness? I'm not sure what we're doing with this.

19 JUDGE BARNETT: I'm not either, but it is  
20 marked restricted.

21 MR. ISAKOFF: Is this document marked  
22 restricted?

23 JUDGE BARNETT: Yes, it is.

24 JUDGE FEDER: Isn't it public testimony?

25 JUDGE BARNETT: It is public testimony.

1 Someone was overzealous with a restricted exhibit  
2 sticker.

3 MR. ISAKOFF: My copy was not. I  
4 apologize, Your Honor. It didn't realize it had  
5 been marked restricted by anybody.

6 JUDGE BARNETT: Is it, Mr. Semel, in  
7 fact, a restricted document?

8 MR. SEMEL: I actually don't know. It's  
9 not my document. That goes somewhat to my -- my  
10 objection, which is if this is not being used for  
11 impeachment, I'm not really sure what place it has.

12 JUDGE BARNETT: What's the purpose,  
13 Mr. Isakoff?

14 MR. ISAKOFF: The purpose is to -- to  
15 show what this -- this witness' understanding of the  
16 801(b) factors is and his use of non-801(b)-related  
17 rates to derive an 801(b) rate, and I needed to show  
18 that in this witness' view, 801(b) factors result in  
19 lower than market rates.

20 And that's why I'm using this document.  
21 If you look at page 2 --

22 JUDGE BARNETT: The objection is  
23 overruled. You -- you may, Mr. Isakoff. And just  
24 for the record, this is not a restricted document;  
25 it's public testimony.

1                   MR. ISAKOFF: It certainly isn't. I  
2 apologize, Your Honor.

3 BY MR. ISAKOFF:

4           Q. Dr. Eisenach, would you look to the  
5 second full paragraph on page 2 of this document?

6           A. Yes, I'm here.

7           Q. Okay. And line -- this had to do with  
8 your commenting on a proposal to amend a portion of  
9 the Copyright Act in such a way that the willing  
10 buyer/willing seller standard would be replaced with  
11 the 801(b) factors, correct?

12          A. For Section 114 licenses, that's correct.

13          Q. Right. And, in fact, it wasn't adopted,  
14 but this was your comment on the proposal to amend  
15 in that fashion, correct?

16          A. And that is correct, yes.

17          Q. Okay. And what you say here, and I'm  
18 reading from line 3 of paragraph 2, "that the  
19 proposal to replace the market-oriented willing  
20 buyer/willing seller standard with the uneconomic  
21 four-part standard under section 801(b)(1) of the  
22 Copyright Act of 1976" -- then skipping a few words  
23 -- "would represent a significant step in the wrong  
24 direction, both because the rates likely to emerge  
25 from the rate-setting process would be below those

1 that would emerge from a competitive market" -- and  
2 then skipping down to the last to last line --  
3 "would create perverse incentives."

4 MR. SEMEL: If we're going to read it,  
5 I'd like to read -- if we're just reading in his  
6 testimony, I'd like -- I don't know what we're doing  
7 with this, but I'd like not to skip things.

8 JUDGE BARNETT: Mr. Isakoff, would you  
9 read the --

10 MR. ISAKOFF: I'll start --

11 JUDGE BARNETT: -- paragraph in its  
12 entirety?

13 MR. ISAKOFF: I will. I will.

14 BY MR. ISAKOFF:

15 Q. "I am referring, of course, to the  
16 proposed Internet Radio Fairness Act" -- can I leave  
17 out the cite?

18 JUDGE BARNETT: You may leave out the  
19 citation.

20 BY MR. ISAKOFF:

21 Q. "While the IRFA contains a number of  
22 provisions designed to tilt the rate-setting process  
23 in favor of copyright owners and against copyright  
24 holders, at its core is its proposal to replace the  
25 market-oriented willing buyer/willing seller

1 standard with the uneconomic, four-part standard  
2 under Section 801(b) of the Copyright Act of 1976  
3 (the '801(b) standard'). To do so would represent a  
4 significant step in the wrong direction, both  
5 because the rates likely to emerge from the  
6 rate-setting process would be below those that would  
7 emerge from a competitive market, and thus reduce  
8 economic welfare, and because the 'non-disruption'  
9 standard contained in Section 801(b)(1)(D) would  
10 create perverse incentives that are fundamentally at  
11 odds with the innovative, dynamic nature of the  
12 market for online music."

13                   Was that your testimony before the House  
14 subcommittee?

15           A.     That's correct.

16           Q.     And is that your view of the 801(b)(1)  
17 factors -- (b)(1) factors now?

18           A.     No.

19           Q.     Okay. And if you'll turn to page 3 of  
20 your testimony of November 12, 19 -- 2000 -- I'm  
21 sorry, November 28, 2012, third full paragraph.

22                   "Second, while IRFA would almost  
23 certainly produce the lower royalty rates its  
24 supporters seek, there is no valid economic or  
25 public policy basis for forcing content providers to

1 subsidize webcasters by charging them below-market  
2 rates."

3 Is it your -- was that your testimony  
4 then?

5 A. This passage -- the answer is yes, that  
6 was my testimony then. But this passage does not  
7 refer just to the 801(b) standard, and I would like  
8 the opportunity, and I'm sure you will give it to  
9 me, to come back and explain my view of the 801(b)  
10 standard then and now.

11 This passage, in particular, though, I'll  
12 point out, refers to IRFA. Which had a number of  
13 different provisions, as I think was quoted in the  
14 first quote that you mentioned, in addition to  
15 imposing the 801(b) standard on the Section 114  
16 license.

17 Q. Okay. And then you attached to your  
18 testimony I think what you referred in your direct  
19 exam today as a lengthy law review article. Is that  
20 right?

21 A. That's correct.

22 Q. Okay. Can we turn to page 24 of that  
23 attachment. Okay. And I'm going to start -- look  
24 at the last paragraph on this page. "To summarize,  
25 while it is theoretically possible for the 801(b)

1 standard to result in the same rates as under the  
2 WBWS standard, there is no question that the two  
3 standards are -- as one supporter of the IRFA  
4 recently agreed -- 'starkly different.'" Starkly  
5 different being in quotes. "Nor is it surprising  
6 that, as one knowledgeable observer recently noted,  
7 'the change from the willing buyer/willing seller  
8 standard to the 801(b) standard is widely  
9 anticipated to significantly lower the royalty rates  
10 that on-line radio services pay.'"

11 And end quote. Is that part of your law  
12 review article that you submitted to the House  
13 subcommittee?

14 A. Yes, it is. And I can -- will point out  
15 and, again, I'll take -- take the moment when you  
16 choose to give it to me, but to point out that this  
17 was -- this is testimony in a law review article  
18 written in the context several years ago, which is a  
19 public policy context, in which consideration was  
20 being given to imposing a new statutory standard on  
21 the 114 license.

22 Part of that standard referred to  
23 replacing the 801(b) -- the willing buyer/willing  
24 seller standard, which as I've testified, I think  
25 typically led to a market-based rate, with the



1 801(b) criteria. Part but not all of it.

2 Two things differ between the context  
3 there and -- two things in particular differ between  
4 the context there and the context here. The first  
5 is that IRFA was an effort to pass legislation which  
6 I think would have been interpreted -- it would have  
7 had a number of provisions and would correctly have  
8 been interpreted as a determination by Congress to  
9 alter the balance of bargaining rights between  
10 Pandora and other interactive services, but Pandora  
11 lobbying for the change. Pandora and other  
12 non-interactive services on the one hand, and the  
13 labels on the other hand.

14 So in the public policy context, this was  
15 understood as an effort to achieve the result which  
16 I'm describing here through means that included the  
17 801(b) standard but also included other statutory  
18 provisions and the legislative history that would  
19 have come along.

20 But, secondly and most importantly, the  
21 provisions that the -- the arguments which I cite on  
22 page 24 -- I think you directed me to part of page  
23 24 -- if you go up to the previous paragraph, what  
24 you see is I say the most meaningful way to  
25 interpret this, the best way to understand it -- if

1 we go to the previous page, you'll see that I say  
2 that the best way to understand the impact of the  
3 801(b) non-disruption standard is to examine how it  
4 is invoked in an actual proceeding.

5           And I then go on -- so that's right at  
6 the bottom of the page there. And if you want to  
7 just go to the next page, you'll see that what I'm  
8 now referencing is the arguments that have been put  
9 forward by the XMSirius experts in the then ongoing  
10 SDARS II proceeding, which not surprisingly  
11 advocated an expansive interpretation of 801(b).

12           And my concern, particularly in the  
13 context of the threat of new congressional  
14 legislation and the statutory interpretation that  
15 could have come with that, was that those  
16 interpretations being put forward by the XMSirius  
17 experts at the time would be embraced by the Board.

18           And to make a long story short, that  
19 didn't happen. As I cite in my direct report, the  
20 Board reiterated in SDARS II the previous 801(b)  
21 standard, which it had -- which it had applied in  
22 the previous SDARS case, and I think in Phonorecords  
23 maybe also. And that is the standard that we  
24 operate under today. And that is the standard which  
25 forms the basis for my opinion that we begin with

1 fair market value and adjust for disruption.

2 It doesn't necessarily mean there  
3 wouldn't be a disruption. Doesn't necessarily mean  
4 there wouldn't be an adjustment, just that that's  
5 the -- that's the order of business.

6 JUDGE BARNETT: Could I ask --

7 BY MR. ISAKOFF:

8 Q. Are you finished? I was going to ask  
9 what the question was because I've forgotten it.

10 JUDGE BARNETT: Dr. Eisenach, was this  
11 published in a separate journal?

12 THE WITNESS: CommLaw -- maybe slightly  
13 edited, but CommLaw Conspectus, which is the law  
14 review of Catholic University.

15 JUDGE BARNETT: And when was this  
16 published?

17 THE WITNESS: That would be on my CV,  
18 maybe a year later.

19 JUDGE BARNETT: A year after your  
20 testimony before Congress?

21 THE WITNESS: It was -- it was published  
22 after my testimony, but I don't recall the date.

23 JUDGE BARNETT: Okay. Thank you.

24 MR. ISAKOFF: Could I have the question I  
25 asked back before that long speech?

1 THE REPORTER: "Question: Can we turn to  
2 page 24 of that attachment. Okay. And I'm going to  
3 start" --

4 Then you read the quote. Do you want me  
5 to read all that?

6 MR. ISAKOFF: No.

7 THE REPORTER: And then you say, "Is that  
8 part of your law review article that you submitted  
9 to the House subcommittee?"

10 MR. ISAKOFF: All right. Okay.

11 BY MR. ISAKOFF:

12 Q. I am going to ask your indulgence and  
13 wait for the questions that I ask. We're counting  
14 time in this proceeding. And it seems to me that  
15 whether I choose to elicit such a long narrative  
16 response is my choice. And that your counsel can  
17 ask questions on redirect, even sometimes leading  
18 questions.

19 A. I'll be concise as I can.

20 Q. Wait for a question, please.

21 So is -- now, I think you said something  
22 about the -- you were concerned that -- how the CRB  
23 was going to interpret 801(b) might change in the  
24 SDARS II proceeding and that, as it turned out, it  
25 didn't, correct?

1 A. Correct.

2 Q. Okay. And what you were -- you say that  
3 your comments about it result -- that the 801(b)  
4 standard would result in lower rates than under the  
5 willing buyer/willing seller standard was based on a  
6 fear that the CRB was going to change its earlier  
7 interpretation of 801(b) as it then existed to that  
8 point; is that right?

9 A. Particularly if the legislation had been  
10 passed, yes.

11 Q. Okay. But you don't really say that  
12 anywhere, either in your testimony or in this  
13 article, do you?

14 A. Say what?

15 Q. Say that your concern is that the CRB is  
16 going to change its interpretation of how the 801(b)  
17 standards apply in order for you to reach your view  
18 that that's why the rates would be below fair market  
19 value, right?

20 A. I think that's the entire interpretation  
21 of the answer that I just gave that you didn't like.

22 MR. ISAKOFF: Well, in that case, Your  
23 Honor, I would like to move for admission of this  
24 document.

25 MR. SEMEL: I object, Your Honor. I'm

1 not really sure what it is being admitted for.

2 MR. ISAKOFF: So that the -- so that the  
3 Judges will have the opportunity to evaluate this  
4 witness' answer in the context of the actual article  
5 at their leisure. Should they -- should they choose  
6 to spend it that way.

7 JUDGE BARNETT: Exhibit 1698 is admitted.

8 (Pandora Exhibit Number 1698 was received  
9 into evidence.)

10 MR. ISAKOFF: Thank you.

11 JUDGE BARNETT: And, Mr. Isakoff, leisure  
12 assumes information not in evidence.

13 MR. ISAKOFF: I -- believe me.

14 JUDGE BARNETT: We're all in that same  
15 boat.

16 MR. ISAKOFF: I appreciate that, Your  
17 Honor.

18 BY MR. ISAKOFF:

19 Q. Now, let's talk a little bit about factor  
20 D. Can we go back to slide 2.

21 Okay. Factor D has to do with disruptive  
22 impact on the structure of the industries involved,  
23 correct?

24 A. That's correct.

25 Q. And in your report, Exhibit 3027, your

1 opening report, written direct testimony, at  
2 paragraph 125 -- let's pull that up. No, no, I'm  
3 sorry paragraph 25. I apologize.

4 Okay. In line 3, you describe the  
5 801(b)(1) factor with regard to minimizing any  
6 disruptive impact as somewhat controversial. That's  
7 line 3.

8 And a sentence down says, "However, I  
9 note that the Board has embraced a constrained  
10 interpretation of the non-disruption standard."

11 The term "constrained interpretation,"  
12 that's your own, correct?

13 A. Yes.

14 Q. That's not something you lifted from any  
15 of the sources that you relied on?

16 A. It's not in quotes, so I hope not. I  
17 don't believe -- I don't believe so. I would put it  
18 in quotes if I had.

19 Q. And in your view, if the Copyright  
20 Owners' rates were adopted, and let's -- and just as  
21 a supposition, the Spotify Free ad-supported service  
22 had to completely close because they regarded it as  
23 unsustainable, you would not regard that as  
24 disruptive unless the result was that consumers no  
25 longer had access to music, correct?

1           A.    I think that's -- I think that's a very  
2   hypothetical question. I don't believe that, as we  
3   talked about, I think, at length at my deposition,  
4   the question of what would happen to the Spotify  
5   Free service is -- is a question where I believe  
6   it's possible that there would be some modifications  
7   that could be made in the Spotify Free service. I  
8   think it's unlikely that Spotify Free, as I  
9   testified this morning, would -- that Spotify would  
10  stop all together its Spotify Free service.

11           Q.    I understand. You changed the  
12  hypothetical, but if the hypothetical is that the  
13  Copyright Owners' rates are adopted and Spotify, in  
14  its business judgment, determines that it cannot  
15  sustain a free ad-supported service, that you would  
16  not regard that as disruptive unless consumers no  
17  longer had access to music, correct?

18                   MR. SEMEL: I would object, Your Honor.  
19  I know experts can consider hypotheticals, but this  
20  is just one variable in a hypothetical that he's  
21  asking. The witness has already said he disagrees  
22  with the foundation of the hypothetical.

23                   MR. ISAKOFF: That's hardly a  
24  hypothetical.

25                   JUDGE BARNETT: Overruled.



1           THE WITNESS: So, again, coming back to  
2 my deposition -- and I'll give you the same answer  
3 here as I gave you there, I think; if I don't, I'm  
4 sure you will call it to my attention -- the -- the  
5 word that's missing in the CRB's interpretation in  
6 order for me to conclude that the disappearance of  
7 the ad-supported service would violate this standard  
8 is the word "service."

9           So looking at the bottom two or three  
10 lines here, as a consequence such adverse impacts  
11 threaten the viability of the music delivery, if the  
12 word "service" appeared there, then I think one  
13 would make an argument, you would make an argument  
14 certainly, and I would consider the argument, that  
15 Spotify Free constitutes a distinct service -- and  
16 then we could argue about the definition of  
17 service -- but a distinct service currently offered  
18 under the license in question.

19           I don't see the word present, and I don't  
20 interpret the sentence that way. So the music  
21 delivery currently offered under the license takes  
22 many forms. And -- and if Spotify Free in its  
23 current form -- again, I don't know what it means to  
24 go completely away.

25           If -- but if Spotify Free in its current

1 form were no longer available, I don't necessarily  
2 believe that that would implicate this standard.

3 JUDGE STRICKLER: Let me ask you a  
4 question, Dr. Eisenach. The standard in question,  
5 which is factor D, 801(b) --

6 THE WITNESS: Yes.

7 JUDGE STRICKLER: -- talks about the  
8 minimization of any disruptive impact on two -- one  
9 of two different things. One is the structure of  
10 the industries involved, and the other one is on  
11 generally prevailing industry practices.

12 So perhaps we take that one at a time.  
13 Do you think, using counsel's hypothetical, the --  
14 if the Copyright Owners' rates would cause the  
15 elimination of the Spotify ad-supported, otherwise  
16 free tier, do you think that would be -- constitute  
17 a disruptive impact on the structure of the  
18 industries involved?

19 THE WITNESS: Not as I interpret  
20 structure as an economist. So I'd go back to the  
21 slide that I showed during my direct testimony,  
22 which shows that Spotify Free customers are, in  
23 fact, multiple-homing, which indicates to me that  
24 there are lots of services which are substitutes for  
25 Spotify Free in the eyes of consumers.

1           So the structure of an industry suggests  
2   that the availability of -- of something the  
3   consumers regard as representing a distinct product  
4   offering would go away. And I think the evidence we  
5   have from -- from that is that consumers regard many  
6   services as being reasonably comparable.

7           JUDGE STRICKLER: And the second prong of  
8   -- of subsection D refers to the minimization of any  
9   disruptive impact on prevailing industry practices.

10           Do you think the elimination of the  
11   Spotify ad-supported service would constitute -- if  
12   Copyright Owners' rates were adopted, would  
13   constitute a disruptive impact on prevailing  
14   industry practices?

15           THE WITNESS: Your Honor, I -- I have to  
16   say I feel we are three layers down. I don't mean  
17   to challenge your question. I'm happy to engage in  
18   the dialogue. Don't get me wrong, but -- but I --

19           JUDGE STRICKLER: In the statute.

20           THE WITNESS: Right, but I -- I feel like  
21   we're three layers now down a hypothetical.

22           The -- so let me -- if you read the last  
23   sentence one more time, and let me try to interpret  
24   it.

25           JUDGE STRICKLER: Sure. I think I'll

1 leave out the first part.

2 THE WITNESS: Yeah, leave out the first  
3 part. Sure.

4 JUDGE STRICKLER: Here it is. To  
5 minimize any disruptive impact on generally  
6 prevailing industry practices.

7 THE WITNESS: I think there the word that  
8 I would look at is the word "minimize." So it can't  
9 possibly mean any rate change would have an impact  
10 on prevailing industry practices. We talked earlier  
11 about the mechanical prong, which would have a very  
12 significant impact if it were removed on prevailing  
13 industry practices.

14 So I -- I think I would say -- I couldn't  
15 say that it would have zero impact. A prevailing --  
16 I'm going to make two points here.

17 I can't say it would make zero impact on  
18 Spotify's industry practice, which is prevailing as  
19 to Spotify.

20 JUDGE STRICKLER: Spotify prevails in  
21 terms of market share, doesn't it?

22 THE WITNESS: Well, but -- but it is, you  
23 know, perhaps significant, that Spotify appears to  
24 be unique in offering an unlimited full-catalogue  
25 free service, ad-supported service. And -- and I

1 think kind of going more broadly to this issue of  
2 Spotify Free, it is unquestionably a distinct  
3 service, different from other offerings in the  
4 marketplace, not offered by any of the other  
5 services for reasons that are, as an economist,  
6 difficult to understand. If it is as important as  
7 Mr. McCarthy or the Services suggest it is, one  
8 would expect other Services to also be offering it,  
9 and yet they're not.

10 In my supplemental report, I --

11 MR. ASSMUS: Your Honor, I just can tell  
12 where the witness is going. His supplemental report  
13 is largely restricted. I just want to remind the  
14 panel and the witness that we should be in  
15 restricted session.

16 JUDGE STRICKLER: Why don't we hold off  
17 on the supplemental.

18 MR. ISAKOFF: We kind of strayed a little  
19 from the hypothetical, and I still never got an  
20 answer. And I'd like to go back to it, if I may.

21 THE WITNESS: If I can -- I can just --

22 JUDGE STRICKLER: Let him finish his  
23 answer.

24 THE WITNESS: Yeah, if I can without --  
25 without going --

1 JUDGE STRICKLER: I promise not to  
2 interrupt your flow after.

3 JUDGE BARNETT: Gentlemen --

4 THE WITNESS: Without going into the  
5 supplemental --

6 JUDGE BARNETT: The court reporter can  
7 record one voice at a time, and we want a complete  
8 record. Go ahead.

9 THE WITNESS: My apologies. Thank you.

10 I think that -- I'll just leave it at  
11 this, and then perhaps come back. I think that a  
12 practice which is engaged in by one service but not  
13 by any other service is -- however large the  
14 service, is not prevailing across the industry,  
15 which even if the service has a large market share.

16 JUDGE STRICKLER: Maybe this is the last  
17 question. Taking what you just said as so, part of  
18 -- your testimony and the testimony of others is  
19 that the Services are all competing for market  
20 share. They're all trying to capture the market.

21 So if one service happens to be  
22 successful in capturing the market or a portion of  
23 the market, say Spotify capturing the so-called free  
24 tier, the ad-supported service, would that  
25 disqualify that as constituting a generally

1 prevailing industry practice because one firm was  
2 successful in either getting in early or  
3 successfully out-competing all the other services in  
4 capturing that particular tier of the market? Why  
5 should that be a basis to disqualify it as a  
6 generally prevailing industry practice?

7 THE WITNESS: Well, I think the question  
8 is -- goes to causality. Why is it that other  
9 services -- simply the fact that Spotify has a very  
10 large share of the ad-supported free market in the  
11 specific form which is Spotify Free, which is not  
12 very far removed from, let's say, Pandora. Pandora  
13 is not interactive service, not qualitative --  
14 arguably that different, so we're talking about like  
15 this (indicating).

16 But if the -- the question that I ask is  
17 if that service is value creating, why would other  
18 Services not offer it, other providers not offer it,  
19 even if they didn't have a large market share? It  
20 would still presumably serve the same function. I  
21 just don't see an economic reason why one service is  
22 doing this and nobody else is.

23 JUDGE STRICKLER: Thank you.

24 BY MR. ISAKOFF:

25 Q. Okay. So I would like to get, if I

1 can -- and maybe the answer is a very simple one --  
2 is it fair to say that your view of disruption under  
3 the fourth 801(b)(1) factor would not be triggered  
4 if the Copyright Owners' rates, if adopted, caused  
5 Spotify to determine it had to close its  
6 ad-supported service so long as consumers had access  
7 to music in some other way?

8 MR. SEMEL: Objection, asked and  
9 answered, Your Honor.

10 MR. ISAKOFF: It has not been answered.

11 JUDGE BARNETT: Overruled. Can you  
12 answer that question directly, Dr. Eisenach?

13 THE WITNESS: I -- I do not think that it  
14 would -- I don't think that the -- I do not think  
15 that the ad-supported service would completely  
16 disappear. I think it's possible that there would  
17 be changes. That having been said, if -- if Spotify  
18 did not offer its ad-supported services, the  
19 substitutes which are -- the other on-line music  
20 which would be available to consumers would not --  
21 would not constitute a loss -- a material loss of  
22 availability to consumers. And, lastly, I would  
23 come back -- so the answer to that question is no.

24 But I also come back and say the  
25 interpretation of the availability standard that



1 you're putting forward here is different from the  
2 interpretation of the availability standard that I  
3 understand, which goes to the availability of  
4 musical works. So -- so we're mixing availability  
5 and disruption.

6 BY MR. ISAKOFF:

7 Q. All I'm asking you is a question.

8 A. But the answer to your question is no.

9 Q. I wasn't putting forward anything. The  
10 answer to the question is no, and that's what I was  
11 looking for. Very simple.

12 Okay. Let's go to slide 3. And what I  
13 would like to do is I have about -- I can't tell  
14 exactly how long this is going to take, maybe not  
15 long -- but go a little while, then I have to go  
16 closed. So maybe that would be the right time for a  
17 lunch break.

18 Slide 3, this summarizes your two  
19 methodologies where Method 1, you're doing it to  
20 test the per-play rate, and -- the Copyright  
21 Owners', and then -- and what you do there is you're  
22 subtracting in the sound recording market the freely  
23 negotiated interactive sound recording per-play that  
24 you derive, per-play rate that you derive, you're  
25 subtracting from that the non-interactive sound

1 recording rate that's determined under the willing  
2 buyer/willing seller regime, under 114.

3 And you're dividing that by this ratio  
4 that you've developed of sound recording to musical  
5 works, correct?

6 A. Correct.

7 Q. Okay. And then the second method you  
8 used, you do this to develop both per-play rates and  
9 per-user per-month rates. And what you do there is  
10 you take the same sound recording interactive  
11 streaming per-play rates that you've derived, and in  
12 the case -- and in the case of the per user per  
13 month, the rate you derive for a monthly rate, and  
14 you then divide that by the same ratio and then  
15 subtract what you say is the performance piece of  
16 the mechanical works right to get your mechanical  
17 right. Is that right?

18 A. That's correct.

19 Q. Okay. All right. Well, we'll get into  
20 the weeds on that. But, actually, I think I've got  
21 to go closed now because I want to talk about -- we  
22 talked about a hypothetical impact. Let's talk  
23 about the real impact. And for that, we need to  
24 close the courtroom.

25 JUDGE BARNETT: Okay. We will at this

1 point ask anyone in the room who has not signed the  
2 nondisclosure certificate in this case, to please  
3 wait outside.

4 (Whereupon, the trial proceeded in  
5 confidential session.)

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1                   O P E N   S E S S I O N  
2                   AFTERNOON SESSION  
3                   (1:05 p.m.)  
4           JUDGE BARNETT: Please be seated.  
5           MR. ISAKOFF: May I proceed, Your Honor?  
6           JUDGE BARNETT: Yes, you may, Mr.  
7 Isakoff. Are we open or closed?  
8           MR. ISAKOFF: We are closed.  
9           JUDGE BARNETT: Okay.  
10           (Whereupon, the trial proceeded in  
11 confidential session.)  
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1 O P E N S E S S I O N

2 BY MR. ISAKOFF:

3 Q. Can we put slide 3 back up. Okay. We're  
4 now going to go back to your methodology, and when  
5 it gets down to specific numbers we will close  
6 again.

7 But -- so I have this slide up just to  
8 remind us where we are. Let's go to page 6 of  
9 Dr. Eisenach's opening report, Rich. And would you  
10 highlight the beginning of the last bullet?

11 And I was struck by the words you used  
12 here because I heard them again on direct  
13 examination a couple of times today, that you adopt  
14 a straightforward and robust benchmarking approach  
15 that involves two main steps.

16 And I think if you turn to paragraph 36,  
17 Rich, you use the same words straightforward and  
18 robust, and we don't have to take a look at it, but  
19 I think you used the word robust again in paragraph  
20 38, and I heard it as robust and straightforward.  
21 Is that the same as fair and balanced?

22 A. I don't think fair and balanced is an  
23 economic term.

24 Q. Is straightforward an economic term?

25 A. Well, I think straightforward is a

1 descriptive term for the methodology that I applied.

2 Q. Okay. Would you call it balanced?

3 A. I wouldn't know what balanced means in  
4 this context. If balanced means unbiased, then I  
5 would call it unbiased.

6 Q. Okay. Would you call it not  
7 manipulative?

8 A. I would not call it manipulative.

9 Q. And you would say you were not  
10 cherry-picking either?

11 A. I was not cherry-picking, that's correct.

12 Q. Okay. All right. So let's talk about  
13 your Method 1 where you start with the all-in sound  
14 recording interactive rates and the all-in sound  
15 recording non-interactive rates.

16 And you subtract one from the other to  
17 get a value for interactivity which you equate to a  
18 concept that doesn't really quite exist on the sound  
19 recording side, to the mechanical works right on the  
20 musical -- I mean the mechanical right on the  
21 musical works side, correct?

22 A. Yes.

23 Q. Okay. And to do that, you looked at  
24 sound recording interactive service agreements, all  
25 of which are unregulated, correct?

1 A. Correct.

2 Q. And every single one of those contracts  
3 that you looked at, maybe there was a couple of  
4 exceptions for Amazon Prime, all contained  
5 percentage-of-revenue prongs, at least prongs if not  
6 exclusively, correct?

7 A. I think all of them would have included  
8 both the per-user or the vast, again, without going  
9 through them one-by-one, per-user or  
10 percentage-of-revenue and typically per-user being  
11 the --

12 Q. Well, we're in open session. So maybe we  
13 shouldn't get into the details of this.

14 A. Fair enough.

15 Q. And the non-interactive sound recording  
16 information that you reviewed is subject to the  
17 willing buyer/willing seller backstop of Section  
18 114, correct?

19 A. That's correct.

20 Q. So you are subtracting a regulated rate  
21 from an unregulated rate, correct?

22 A. Yes, that's correct.

23 Q. Okay. And I think that you used the term  
24 -- I know you did in your report -- we don't have to  
25 go there every time I say this, because maybe you

1 will agree, that the sound recording agreements were  
2 "freely negotiated." Do you recall using that  
3 terminology?

4 A. I wouldn't -- without going to the  
5 phrase, I believe they satisfy the fair market value  
6 standards. I am not denying using the phrase. I  
7 don't recall using it but I may have.

8 Q. Okay. Let's go to paragraph 37 of your  
9 opening report. Before we do that, did you reread  
10 your report before testifying here today?

11 A. Yes.

12 Q. When?

13 A. Over the last couple of days.

14 Q. Okay. All right. Line 3 says they are  
15 freely negotiated in an unconstrained marketplace.  
16 Do you see that?

17 A. Yes.

18 Q. Is that referring to the sound recording  
19 interactive service agreements?

20 A. Yes.

21 Q. And you also, I think, have the belief  
22 that they are not substantially affected by the  
23 record labels' undue bargaining power or market  
24 power, correct?

25 A. And as I -- yes, undue market power would



1 be the phrase I would use.

2 Q. Okay.

3 A. Excuse me, bargaining, I apologize, undue  
4 bargaining power.

5 Q. Okay.

6 JUDGE STRICKLER: How do you distinguish  
7 between bargaining power and undue bargaining power?

8 THE WITNESS: Well, you know, I think it  
9 is at the end of the day a subjective determination.  
10 I don't think there is any empirical or precise  
11 definition. I think you look at the ability of one  
12 party to a negotiation to extract value from the  
13 deal by -- from a deal between the two of them by  
14 virtue of the lack of choices available to the other  
15 party.

16 And so in this case you have the  
17 publishers and the labels who have rights which one  
18 does need to have if one wants to go into the  
19 interactive or non-interactive service business,  
20 depending on what we're talking about.

21 But, on the other hand, you have in my  
22 view Services who are not compelled to go into that  
23 business.

24 So in my view you have reasonably  
25 balanced power.

1 JUDGE STRICKLER: So the market power is  
2 not undue because you have companies -- and I assume  
3 you are talking about -- I am not going to assume  
4 anything.

5 What companies are you talking about that  
6 you say have the ability to exit the market and,  
7 therefore, there is no undue bargaining power  
8 operating against them?

9 THE WITNESS: Well, at the time that  
10 these agreements were negotiated, I think what is  
11 important here is you have a very dynamic  
12 marketplace in which new services are being launched  
13 all the time.

14 So even for companies that are in the  
15 market, Amazon, for example, is negotiating to  
16 launch a new service. And it has the option of  
17 launching that service or not launching that  
18 service. Pandora is negotiating to launch a new  
19 service.

20 What we see, in fact, is that we see  
21 services, the rates which are negotiated by Services  
22 which are in the process of entering, being  
23 identical to or comparable to the rates being  
24 negotiated by Services which are already in.

25 So the fact -- which indicates that

1 whatever is happening, the rightsholders are not  
2 utilizing whatever, their must have ability to  
3 discriminate even against the firms who have already  
4 launched.

5 JUDGE STRICKLER: I think you said a  
6 moment ago that those larger firms have the ability  
7 to not launch the new product because -- you didn't  
8 say this, I will say this, you tell me if it is what  
9 you meant -- they are so large that their survival  
10 is not at stake as to whether or not they can --  
11 their survival is not at stake if they choose not to  
12 enter into that particular market?

13 THE WITNESS: Not only -- yes, that's  
14 correct.

15 JUDGE STRICKLER: So in that sense it's  
16 not really market power that you're talking about.  
17 You are just talking about corporate power because  
18 the market power would reflect the relative value of  
19 the inputs that are necessary to make a profit in  
20 that market.

21 It sounds like what you are saying is  
22 that these companies, particularly but not  
23 necessarily exclusively, Amazon, Apple, and Google,  
24 have such size that they can -- they don't care  
25 about market power. They operate outside of the

1 market power constraint because of their  
2 conglomerate-type nature, if you will.

3 THE WITNESS: Here would be my --

4 JUDGE STRICKLER: Do you agree with that  
5 or disagree with that?

6 THE WITNESS: Well, if I could explain a  
7 little, I -- I would interpret it just a little bit  
8 differently. What I believe we have going on in  
9 these markets are one-on-one negotiations,  
10 bargaining. And that's fundamentally different from  
11 kind of the neoclassical model of price makers and  
12 price takers.

13 So when Google and the publishers are  
14 sitting across the table from each other, what's  
15 relevant, the concept of market power becomes a  
16 little -- I am not sure of the right concept to  
17 apply.

18 The concept that really has probative  
19 power in my view is bargaining power, negotiating  
20 leverage.

21 And that's a different concept. It is  
22 not so much about values, the marginal revenue  
23 product of an input, for example, which we think  
24 about in the neoclassical world. It is about best  
25 alternatives to a negotiated agreement.

1           So my approach in this market is to think  
2 about prices set between parties who are in the Nash  
3 world dividing equally between them, if bargaining  
4 power is reasonably evenly divided, equally between  
5 them the value of the deal relative to the next best  
6 alternative to a negotiated agreement.

7           JUDGE STRICKLER: And the next best  
8 alternative that you are speaking of for these  
9 larger companies is to invest their capital  
10 somewhere else?

11           THE WITNESS: In the next bet down the  
12 line.

13           JUDGE STRICKLER: So in a sense we're  
14 really looking at these large companies, if I  
15 understand your testimony correctly, as investors in  
16 the market who can take their capital that may well  
17 have been generated internally and move it to some  
18 other alternative in the same way that, if you read  
19 Mr. Pakman's testimony, venture capitalists have to  
20 decide where to put their money.

21           Amazon, Google, Apple, by way of example,  
22 can take their money and put it wherever they think  
23 they're going to get the greatest return across  
24 markets, not necessarily within this market?

25           THE WITNESS: I can't improve on that

1 description. That's exactly the way I see it, yes.

2 JUDGE STRICKLER: Thank you.

3 BY MR. ISAKOFF:

4 Q. And I would like to talk about some of  
5 this a little bit more in open session, since I know  
6 that's what we prefer to do where we can, but we're  
7 going to have to get into the contracts.

8 But just to be very precise, the data  
9 that you're relying on as your benchmark is  
10 interactive sound recording contracts between  
11 Services and labels during 2015, correct, with those  
12 contracts that produced the royalties in 2015,  
13 correct? It is all 2015 data?

14 A. Yes, that's correct.

15 Q. Okay. Let's go to Exhibit 1460 in your  
16 binder. I will tell you which binder in a second.  
17 That is the second item in Binder 2. This is 1460  
18 in evidence.

19 A. I see that.

20 Q. Okay. And this is the CRB decision in  
21 the Web IV case from last May, correct?

22 A. It appears to be, yes.

23 Q. Okay.

24 A. It appears to be.

25 JUDGE STRICKLER: Is this Volume 2 of 2?

1 MR. ISAKOFF: Volume 2 of 2.

2 JUDGE STRICKLER: The exhibit number  
3 again? I'm sorry.

4 MR. ISAKOFF: 1460. The second item, I  
5 think.

6 BY MR. ISAKOFF:

7 Q. And if you would turn, please, I am going  
8 to walk a little bit through some of the things that  
9 the Judges said and just maybe get some of your  
10 reactions to them.

11 If you will turn first to the page that  
12 has 26332 in the upper left-hand corner.

13 MR. SEMEL: Your Honor, I would just  
14 object, outside the scope based on that description  
15 that we're going to walk through things the Judges  
16 said and get his reaction to them.

17 MR. ISAKOFF: He relied on this in his  
18 report. He says so. And this concerns the state of  
19 the very benchmark that he used in 2011 to 2014,  
20 some of the very same agreements that he attached --

21 JUDGE BARNETT: Thank you, Mr. Isakoff.  
22 At this point, Mr. Isakoff, you can ask questions  
23 about it but you don't have to go through and read  
24 it. We're familiar with it.

25 MR. ISAKOFF: Okay.

1 BY MR. ISAKOFF:

2 Q. Are you -- well, okay. Well, are you  
3 familiar with the -- are you familiar with the  
4 notion that in Web IV the Judges were trying to  
5 determine a rate under willing buyer/willing seller  
6 standard, which is somewhat less stringent than the  
7 one at issue here?

8 A. Without, without adopting your  
9 characterization of the standards, I don't know what  
10 stringent means but, yes, they were trying to apply  
11 the willing buyer/willing seller standard.

12 Q. And you understand that the position of  
13 the Judges was that they had to set a rate that  
14 reflected a market that was effectively competitive?

15 A. Yes, I do.

16 Q. Okay. And you understand that in that  
17 case there was unrebutted testimony and evidence  
18 that there was a complementary oligopoly on behalf  
19 of the record companies who had every incentive to  
20 fight such a finding and failed, correct?

21 MR. SEMEL: Again, objection. I feel  
22 like he is trying to put in the Web IV evidence into  
23 this case somehow.

24 JUDGE BARNETT: What's the legal basis of  
25 your objection?



1                   MR. SEMEL: Outside the scope. I mean, I  
2 think he is just putting in evidence from Web IV.

3                   JUDGE BARNETT: Mr. Isakoff, how is it  
4 relevant?

5                   MR. ISAKOFF: It is directly relevant.  
6 It is the very same contracts in many cases, which I  
7 am going to go through when we go to closed session.  
8 The data that was at issue there was 2011 to 2014.  
9 The contracts are multi-year contracts. All of this  
10 data is 2015, identical market.

11                   This was litigated. This Panel made  
12 findings based on litigation. The rule, Federal  
13 Rule of Evidence 201 allows judicial notice. There  
14 is absolutely no question of the intense relevance  
15 of this decision, which he also relied on in his  
16 report, for the basic notion that he could rely on  
17 sound recording interactive streaming agreements and  
18 make no adjustment, even while this Panel made a  
19 12 percent adjustment specifically because it found  
20 a complementary oligopoly.

21                   JUDGE STRICKLER: When you say he relied  
22 -- I'm sorry, go ahead.

23                   JUDGE BARNETT: It might be better if you  
24 just ask him the questions about the contracts and  
25 then if there is some contradiction you find in the

1 Web IV determination, you can refer back to that.

2 We don't need to go through Web IV.

3 MR. ISAKOFF: The point is, Your Honors,  
4 that Web IV involved the very same evidence, a  
5 slightly displaced one-year period, and he is  
6 relying on the sound recording rates without making  
7 any adjustment, contrary to what this Panel did.

8 JUDGE BARNETT: I heard you. I heard you  
9 say that. Thank you.

10 Now, ask him the questions and then you  
11 can refer back to the Web IV determination, if  
12 necessary.

13 MR. SEMEL: If we may just before we  
14 proceed, just because I am concerned, I feel like  
15 counsel just outlined the factors for issue  
16 preclusion or collateral estoppel but failed to note  
17 that we were not party to Web IV.

18 And I feel like he is trying to import  
19 evidence and use it in this proceeding against  
20 people who are not parties to that proceeding  
21 without it actually being in evidence.

22 JUDGE BARNETT: Well, he is not importing  
23 anything. We can take official notice of what's in  
24 our records and go from there.

25 MR. SEMEL: Thank you.

1                   MR. ISAKOFF: That's exactly the way I'm  
2 using it, Your Honor, is official or judicial  
3 notice, not collateral estoppel.

4 BY MR. ISAKOFF:

5           Q. You made no adjustment to the sound  
6 recording royalty data that you used for 2015 for  
7 any complementary oligopoly effect, did you?

8           A. No, I did not.

9           Q. And you do recall that this Panel made a  
10 12 percent adjustment?

11          A. If I may, the Panel made, as I understood  
12 it, and we talked about this in my deposition, the  
13 Panel -- and I feel at great risk both being an  
14 economist and sitting in front of the Panel, you are  
15 asking for my interpretation, so I will give it to  
16 you.

17                   My understanding of that as I read it was  
18 that the -- there were two things going on there.  
19 First of all, the determination that there was a  
20 12 percent effect of steering that was occurring in  
21 the non-interactive market which was not present in  
22 the interactive market, and that that 12 percent  
23 impact should be taken into account in making an  
24 adjustment from a benchmark for the interactive  
25 market to a non-interactive market.

1           So that's my understanding of that.

2           Q.    Okay.  And you didn't understand that the  
3   12 percent steering adjustment was used to measure  
4   the adjustment of what would make the benchmark  
5   effectively competitive and that you think it is  
6   because there was the ability to steer in the  
7   non-interactive market that made the adjustment?

8           A.    The -- the -- I don't have -- I don't  
9   have an economic opinion on how the Court was  
10  interpreting.  I told you my understanding is that  
11  it came from the 12 percent.

12                I just don't have an economic  
13  interpretation of what the Court was -- I have read  
14  the decision more than once, but I don't have an  
15  economic interpretation of how that was decided.

16           Q.    And you believe that it is not  
17  appropriate to make a similar adjustment to your  
18  2015 data here because you are not adopting the  
19  opinion necessarily embraced by the CRB in Web IV,  
20  correct?

21           A.    Well, I think the -- A, that is correct.  
22  I am not -- I don't have an opinion on the findings  
23  of the CRB in Web IV.

24                Again, just to repeat my prior answer to  
25  make sure the point is clear, the adjustment made in

1 Web IV, as I understood it, was an adjustment to  
2 reflect differences in the market for interactive  
3 services and non-interactive services.

4 And the separate question of the nature  
5 of the market power identified in the interactive  
6 services market is one that I don't have a clear --  
7 I read the decision. I don't have a clear  
8 understanding of what the Court was doing in that  
9 respect.

10 Q. Now, do you recall that the data to which  
11 the adjustment of 12 percent was made concerned the  
12 period 2011 to '14?

13 A. I will accept that. I don't recall that  
14 sitting here now.

15 Q. Okay.

16 MR. ISAKOFF: Does counsel have an  
17 objection if I point out -- point that out in Web  
18 IV, specifically page 26405, left-hand column?

19 MR. SEMEL: Your Honor, I just think  
20 we're well beyond the scope of his direct. We're  
21 just going through Web IV.

22 JUDGE BARNETT: That objection is  
23 overruled.

24 BY MR. ISAKOFF:

25 Q. All right. Well, you can take my word

1 for it it's at 26405, which gives you the time  
2 frame.

3 Is it fair to say that you distinguish  
4 your 2015 data from what was before the CRB in Web  
5 IV because these concerned agreements reached years  
6 ago?

7 A. I think I may have used the phrase "years  
8 ago" in my -- in my deposition.

9 Q. And, in fact, many of the same agreements  
10 that produced the data that was being looked at for  
11 2011 to 2014 were still in effect in 2015, the year  
12 covered by your data?

13 A. I think that's possible.

14 Q. Well, we will look. In fact, I think now  
15 is a good time to close the courtroom.

16 JUDGE BARNETT: We are going to enter a  
17 restricted session. If you are in the hearing room  
18 and do not have rights to hear or observe restricted  
19 material, please wait outside.

20 (Whereupon, the trial proceeded in  
21 confidential session.)

22

23

24

25

1 O P E N S E S S I O N

2 BY MR. WETZEL:

3 Q. Dr. Eisenach, this morning you discussed  
4 your Method 1 calculation to arrive at an implicit  
5 mechanical rate for sound recordings. Do you recall  
6 that testimony?

7 A. Yes, I do.

8 Q. And for streaming services, you  
9 analogized the mechanical right and musical works to  
10 the reproduction rights in sound recordings; is that  
11 correct?

12 A. Yes.

13 Q. Your calculation of an implicit  
14 mechanical rate was based on your understanding that  
15 interactive services pay record labels for  
16 reproduction and public performance rights; whereas  
17 non-interactive services require only the statutory  
18 public performance right for sound recordings,  
19 correct?

20 A. Yes.

21 Q. And you infer that the difference between  
22 non-interactive streaming payments and interactive  
23 streaming payments is for reproduction rights as  
24 opposed to public performance rights of sound  
25 recordings made in connection with interactive

1 streams, right?

2 A. I think that's representative of the  
3 incremental value, yes.

4 Q. But non-interactive services pay record  
5 labels or SoundExchange for reproduction rights in  
6 addition to public performance rights, don't they?

7 A. I'm not sure what you mean.

8 Q. Non-interactive services pay for a  
9 Section 114 license covering public performance  
10 rights?

11 A. Right.

12 Q. And for a Section 112 license covering  
13 reproductions of sound recordings, in connection  
14 with non-interactive streaming, don't they?

15 A. When they -- when they engage in  
16 non-interactive streaming.

17 Q. And the statutory rates set by the  
18 Copyright Royalty Board historically bundled the  
19 payments for public performance and reproduction  
20 rights to record labels into a single rate, don't  
21 they?

22 A. I'm not sure I understand your question.  
23 Are you asking about a part of the law? I'm not  
24 sure I'm --

25 Q. Is it fair to say that your analysis



1 doesn't account for the value of the reproduction  
2 rights conveyed by the Section 112 license or to any  
3 equivalent rights conveyed in direct licenses  
4 between sound recording companies and  
5 non-interactive streaming services, does it?

6 A. I'm not sure whether it does. The 112  
7 license you will remind me is the license for --  
8 describe the 112 license.

9 JUDGE BARNETT: It is sometimes referred  
10 to as ephemeral.

11 THE WITNESS: I had a feeling we were  
12 talking about the ephemeral license. I wouldn't  
13 think that would be a material difference, but thank  
14 you for the question.

15 BY MR. WETZEL:

16 Q. You made no adjustment for the 112  
17 license?

18 A. That's correct.

19 Q. Okay. Do you agree that access to music  
20 on-demand is a substantial value separate and apart  
21 from the value obtained from listening to the music,  
22 correct?

23 A. Yes.

24 Q. And that's because you receive access to  
25 an entire library for unlimited listening; is that

1 correct?

2 A. Yes. You are putting it in terms of  
3 listening to music as opposed to access to music. I  
4 would say ownership of music as opposed to access.  
5 We're talking about sort of qualitative terms here,  
6 but I agree that there is a separate value for  
7 access.

8 Q. Well, let me refer you to your rebuttal  
9 testimony.

10 A. Okay.

11 Q. Paragraph 51, if we can put that up on  
12 the screen. It is 3033. Do you see where it says  
13 in the second sentence, "access to music on-demand  
14 is a substantial value separate and apart from the  
15 value obtained from listening to music?"

16 A. Thank you. In that context I think  
17 that's correct.

18 Q. And that's because you receive access to  
19 an entire library for unlimited listening, correct?

20 A. Yeah, that's correct.

21 Q. And you agree that the access value  
22 exists whether the subscriber plays ten songs or 10  
23 million songs, correct?

24 A. That's correct.

25 Q. And that's why on-demand services market

1 the size of the catalogues that they offer, correct?

2 A. The value -- the options value is, yes,  
3 is what they are marketing there.

4 Q. You view the size of the music library to  
5 which a Service offers access as a differentiating  
6 feature of the Services, don't you?

7 A. Yes.

8 Q. Now, I want to discuss some of your  
9 testimony earlier today about the difference between  
10 micro-synch licenses and synch licenses.

11 A. Yes.

12 Q. You noted this afternoon that there was  
13 an important difference between full catalogue  
14 micro-synch licenses, on the one hand?

15 A. Right.

16 Q. And one-off synch licenses involving just  
17 one work on the other hand. Do you recall that  
18 testimony?

19 A. Yes.

20 Q. Your primary benchmarks in this case are  
21 full catalogue licenses, correct?

22 A. I think I used both the full catalogue  
23 licenses and the one-off licenses, but I may be --  
24 you may be correct.

25 Q. The Pandora licenses that you rely on

1 each include the rights to the publishers or the  
2 performing rights organizations?

3 A. I apologize. I misunderstood your  
4 question. Do you mind, the licenses that you  
5 referred to in your question were the benchmarks  
6 being the sound recording licenses for interactive  
7 services; is that what you mean?

8 Q. We will get to those.

9 A. Okay.

10 Q. But there were a series of licenses that  
11 you discussed and used in your calculations,  
12 correct?

13 A. Correct. I'm sorry, I thought you were  
14 referring just to the full catalogue synch licenses.  
15 You are talking about all of the benchmarks? The  
16 benchmarks which I relied upon more broadly in my  
17 analysis are full catalogue licenses, that is  
18 correct.

19 Q. The Pandora licenses are full catalogue  
20 licenses offering a license to the rights to the  
21 publishers and performing rights organizations  
22 entire catalogues or repertoires, correct?

23 A. Yes.

24 Q. And the YouTube licenses, you rely on  
25 each include the rights to the publishers or the

1 record labels' entire catalogues also, correct?

2 A. Yes, that's correct.

3 Q. And the Section 114 license is a blanket  
4 license, correct?

5 A. Yes.

6 Q. And the interactive sound recording  
7 licenses between Services and labels that you  
8 discussed with Mr. Isakoff this morning are licenses  
9 that provide rights to the labels' catalogues as  
10 opposed to individual sound recordings, correct?

11 A. Yes.

12 MR. WETZEL: I have no further questions.

13 JUDGE BARNETT: Mr. Assmus?

14 MR. ASSMUS: Yes, Your Honor, we need to  
15 return to closed session quickly. It will be very  
16 brief.

17 JUDGE BARNETT: Okay.

18 (Whereupon, the trial proceeded in  
19 confidential session.)  
20  
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## 1 C O N T E N T S

2 WITNESS DIRECT CROSS REDIRECT RECROSS

3 JEFFREY A. EISENACH

4 4582 4661

5 4834

6 4850

7 4858

8 4867 4871 4876

9

10 AFTERNOON SESSION: 4708

11

12 CONFIDENTIAL SESSIONS: 4603-4660,

13 4700-4707, 4709-4721, 4740-4850, 4858-4883

14

## 15 E X H I B I T S

16 EXHIBIT NO: MARKED/RECEIVED REJECTED

17 AMAZON

18 84 4659

19 93 4659

20 181 4658

21 182 4658

22 233 4659

23 GOOGLE

24 388 4658

25 539 4658

	EXHIBIT NO:	MARKED/RECEIVED	REJECTED
2	GOOGLE		
3	576	4658	
4	592	4658	
5	595	4659	
6	613	4658	
7	626	4658	
8	643	4658	
9	648	4658	
10	650	4658	
11	655	4658	
12	669	4658	
13	670	4658	
14	672	4658	
15	731	4658	
16	742	4658	
17	743	4658	
18	744	4658	
19	748	4658	
20	749	4658	
21	764	4658	
22	794	4658	
23	795	4658	
24	798	4659	
25	804 through 807	4658	

1	EXHIBIT NO:	MARKED/RECEIVED	REJECTED
2	GOOGLE		
3	846	4659	
4	855	4659	
5	858	4659	
6	PANDORA	MARKED FOR ID ONLY	
7	6028	4662	
8	6029	4782	
9	PANDORA	MARKED/RECEIVED	
10	918	4659	
11	939	4659	
12	976	4658	
13	978	4658	
14	1698	4686	
15	SPOTIFY		
16	1028	4659	
17	1048	4659	
18	COPYRIGHT OWNERS		
19	2504	4658	
20	2505	4658	
21	2508	4658	
22	2527	4658	
23	2530	4658	
24	2545	4658	
25	2549	4658	



1	EXHIBIT NO:	MARKED/RECEIVED	REJECTED
2	COPYRIGHT OWNERS		
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4	2592	4658	
5	2603	4658	
6	2604	4658	
7	2608	4658	
8	2609	4658	
9	2610	4658	
10	2612 through 2616	4658	
11	2669	4659	
12	2691	4659	
13	2692	4659	
14	2693	4659	
15	2694	4659	
16	2698	4659	
17	2728	4659	
18	2729	4659	
19	2730	4659	
20	2731	4659	
21	2736	4658	
22	2732 through 2735	4658	
23	2737	4658	
24	2739	4658	
25	2740	4658	

1	EXHIBIT NO:	MARKED/RECEIVED	REJECTED
2	COPYRIGHT OWNERS		
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4	2745	4659	
5	2748	4659	
6	2750	4659	
7	2751	4659	
8	2753	4659	
9	2754	4659	
10	2755	4658	
11	2757	4659	
12	2758	4658	
13	2759	4659	
14	2760 through 2763	4658	
15	2765 through 2770	4658	
16	2782	4659	
17	2783 through 2791	4658	
18	2792	4659	
19	2793 through 2796	4659	
20	2797	4658	
21	2798 through 2802	4659	
22	2804 through 2810	4659	
23	2812 through 2817	4659	
24	2819 through 2822	4659	
25	2824 through 2828	4659	

1	EXHIBIT NO:	MARKED/RECEIVED	REJECTED
2	COPYRIGHT OWNERS		
3	2829	4658	
4	2830	4658	
5	2831 through 2836	4659	
6	2838 through 2841	4659	
7	2842	4658	
8	2843 through 2854	4659	
9	2947	4660	
10	3027	4586	
11	3033	4586	
12	3276	4658	
13	3277	4658	
14	3278	4658	
15	3280	4658	
16	3281	4658	
17	3283	4660	
18	3309	4658	
19	3387	4660	
20	3388	4658	
21	3389	4658	
22	3390	4660	
23	3391	4660	
24	3392	4660	
25	3393	4658	

# CERTIFICATE

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I certify that the foregoing is a true and accurate transcript, to the best of my skill and ability, from my stenographic notes of this proceeding.

4/5/5-1

Dr. Pappas

Date                      Signature of the Court Reporter